

1 BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

2 NANCY KEENAN

3 STATE OF MONTANA

4 * * * * *

5	SPECIAL SERVICES EDUCATION)	
6	ASSOCIATION, MEA/NEA,)	OSPI 189-90
7)	(SECOND APPEAL)
8	Appellant,)	
9	vs.)	DECISION & ORDER
10)	
11	YELLOWSTONE/WEST CARBON COUNTY)	
12	SPECIAL SERVICES COOPERATIVE,)	
13)	
14	Respondent.)	

15 * * * * *

16 The Special Services Education Association was certified as
17 the exclusive collective bargaining representative for the staff
18 of the Cooperative on October 29, 1986. Prior to that date, a
19 policy manual and a master agreement guided the employment
20 relationship between the parties.

21 By memorandum dated August 18, 1986, the Cooperative Director,
22 Vernon D. Barkell, announced to the "Cooperative Staff" that "[t]he
23 Cooperative Management Board at its August, 1986, meeting voted to
24 implement new regulations pertaining to mileage reimbursement for
25 job related travel." On August 29, 1986, the staff filed a
grievance challenging the policy revision. The staff moved this
grievance through the level of the County Superintendent. They did
not appeal the November 25, 1986 decision of the County
Superintendent.

 The Association filed a new grievance challenging the

1 Cooperative's unilateral adoption of the revised mileage
2 reimbursement on December 8, 1986, contending that it was a
3 continuing violation of the "meet and confer" policy agreed to by
4 the Cooperative Board and the Cooperative staff. The grievance
5 filed on December 8, 1986, was appealed to Yellowstone County
6 Superintendent H. C. Christiansen. Superintendent Christiansen
7 disqualified himself because of a conflict of interest. Acting
8 County Superintendent Donald L. Bidwell heard the case on May 13,
9 1987. Mr. Bidwell found that the Cooperative Board had complied
10 with the "meet and confer" requirement and denied the grievance.
11 The Association appealed the County Superintendent's decision to
12 the Superintendent of Public Instruction on July 9, 1987.

13 Hearing Officer Donald Bidwell, found as a conclusion of law:

14 "That mileage reimbursement for this Cooperative was
15 based upon a policy manual which was subject to amendment
at will following "meet and confer."

16 Therefore, the contract contemplated such amendments which
17 allowed for changes in compensation. (u) However, the facts as found
18 by Mr. Bidwell failed to state when the matter was submitted to
19 "meet and confer." [Emphasis added.] The State Superintendent
20 remanded the matter back to the County Superintendent to determine
21 when the matter was submitted to the "meet and confer" committee.

22 On July 16, 1990, Acting County Superintendent Carole
23 Reynolds, [Donald L. Bidwell was no longer a qualified County
24 Superintendent] made the following finding of fact:

25 "3. Finally, at the rehearing, the policy involved in
this matter, R-2 was referred to specifically by Vern
Barkell, as the policy resubmitted to 'meet and confer'
on August 21, 1986. Again, a copy of this policy R-2 is

1 attached hereto for reference. It can be seen from the
2 policy R-2 itself that it was effective on Thursday,
3 August 21, 1986, which is the same day that it was
4 submitted to 'meet and confer.'"

5 Although instructed by the State Superintendent to apply
6 Conclusion of Law 5 to the facts as found, her decision does not
7 contain an order resulting from her application of the law to the
8 facts. The Association appealed the decision of the County
9 Superintendent to the State Superintendent on July 19, 1990.

10 This Superintendent did not receive a printed transcript of
11 the hearing held on June 12, 1990. She did, however, receive a
12 tape recording of the hearing. The final portion of the tape is
13 inaudible. The record is sufficient as to the issues on appeal.
14 Therefore, having reviewed the entire record and briefs of the
15 parties, this Superintendent now makes the following decision and
16 order:

17 DECISION AND ORDER

18 The State Superintendent of Public Instruction has
19 jurisdiction to hear this appeal. The parties to this contested
20 case voluntarily entered into an agreement which provided that
21 grievances filed under the agreement could be appealed to the
22 County Superintendent. Neither party has challenged the
23 jurisdiction of the State Superintendent to hear the appeal.

24 The Cooperative Management Board failed to submit its revised
25 mileage reimbursement policy to a "meet and confer" committee prior
to its adopting the revised policy the second week in August, 1986.
The entire record supports the fact that the Board did not submit
the revised policy to the Cooperative staff until August 21, 1986.

1 The decision of the County Superintendent is hereby reversed and
2 the grievance held valid.

3 The Cooperative shall compute the amount of the mileage
4 reimbursement that is due to Cooperative staff in accordance with
5 the policy in place prior to the revision adopted in early August
6 1986. The Cooperative shall deduct the amount of the mileage
7 reimbursement paid to the Cooperative staff member under the
8 revised policy and shall pay the staff member the remaining amount
9 due. Unless the parties have negotiated a change in the mileage
10 reimbursement policy since the Association was certified, the
11 Cooperative shall continue to compute amounts due for travel
12 reimbursement in accordance with the prior policy unless interim
13 statutory changes require a different amount.

14 MEMORANDUM OPINION

15 The standard for review by the State Superintendent is set
16 forth in Rule 10.6.125, ARM. This rule was modeled upon Section
17 2-4-704, MCA, and the Montana Supreme Court has interpreted the
18 statute and the rule to mean that agency (County Superintendent)
19 findings of fact are subject to a clearly erroneous standard of
20 review and that conclusions of law are subject to an abuse of
21 discretion standard of review. Harris v. Bauer, ___ Mont. ___,
22 749 P.2d 1068, at 1071, 45 St. Rptr. 147, at 151, (1988). Further,
23 the petitioner for review bears the burden of showing that they
24 have been prejudiced by a clearly erroneous ruling. Terry v. Board
25 of Regents, 220 Mont. 214, at 217, 43 St. Rptr. 304, at 308, 714
P.2d 151, at 153 (1986). Findings are binding and not "clearly

1 erroneous" if supported by "substantial credible evidence in the
2 record." This has been further clarified to mean that a finding
3 is clearly erroneous if a "review of the record leaves the court
4 with the definite and firm conviction that a mistake has been
5 committed."

6 In her ORDER of remand to the County Superintendent, the State
7 Superintendent held that Finding of Fact No. 6 was incomplete.
8 Finding of Fact No. 6 stated:

9 "That 'meet and confer' discussion did take place over
10 the controverted policy which was what existing policy
and past practice called for."

11 Conclusion of Law No. 5 stated:

12 "That mileage reimbursement for this Cooperative was
13 based upon a policy manual which was **subject to amendment**
14 **at will following 'meet and confer'**. Therefore the
contract contemplated such amendments which allowed for
changes in compensation." [Emphasis added.]

15 The Acting County Superintendent, Carole Reynolds, made the
16 following finding of fact after the June 12, 1990 hearing:

17 "3. Finally, at the rehearing, the policy involved in
18 this matter, R-2, was referred to specifically by Vern
19 Barkell, as the policy resubmitted to "meet and confer"
20 on August 21, 1986. Again a copy of this policy R-2 is
attached hereto for reference. It can be seen from the
policy R-2 itself that it was effective on Thursday,
August 21, 1986, which is the same day that it was
submitted to 'meet and confer.'"

21 The testimony of Vern Barkell at the June 12, 1990 hearing
22 supports the finding that the first submission of the revised
23 mileage reimbursement policy to the Cooperative staff occurred on
24 August 21, 1986. Therefore, the use of the word "resubmitted" in
25 Finding of Fact No. 3 is clearly erroneous and not supported by
reliable evidence. Vern Barkell also testified at the original

1 hearing in this matter. Barkell's testimony begins at page 85 and
2 ends on page 106. His testimony on pages 89 and 90 states:

3 Q. And do you recall approximately when the presentation
4 was first made to that [management] committee, relative
to what became policy R-2?

5 A. No, I can't recall a precise date. It was probably
6 during our June or July Management Board meeting.

7 Q. Okay, and that would have been of 1986?

8 A. Yes.

9 Q. And do you recall when action was taken to determine
that policy R-2 would issue?

10 A. The date I can't recall. It would have been normally the
11 second Tuesday of August.

12 Q. Again, 1986?

13 A. Yes, That's when we normally have had our Board
14 meeting, but I cannot recall whether that was the date.
Our records would show that.

15 Q. Within your knowledge, did you negotiate for policy
R-2 with any union or bargaining unit?

16 A. No.

17 Q. Did you negotiate for policy R-2 with any of the
18 witnesses that have appeared here today for the
petitioner?

19 A. No.

20 Q. Did you have any process in place where you
21 negotiated for this policy with any members of the staff?

22 A. No.

23 Q. Why not?

24 A. The policy as it stood, the R-1 policy, was a
25 Management Board policy which the Management Board
considered their prerogative to administer, and was not
considered by the Management Board a negotiated item.

1 Page 91 of testimony:

2 Q. Now, can you tell us whether policy R-2 was then
3 later communicated to the staff members, as you had
previously described?

4 A. Yes. At the PRI session, it was briefly covered in
5 relationship to all the rest of the policies and
6 procedures that we had made adjustments in, or changes,
7 or that new people needed to be informed about. Then my
8 recollection is that we discussed, or I discussed it at
length with the staff in the afternoon of one of the days
that we met, to not negotiate it, but to attempt to
explain the rationale behind it.

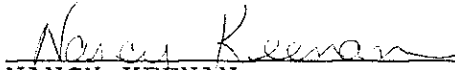
9 The above testimony, together with Mr. Barkell's testimony on
10 June 12, 1990, support the fact that the Cooperative Board adopted
11 the revised mileage reimbursement policy prior to the time it was
12 submitted to the "meet and confer" committee. According to
13 testimony of Vern Barkell, the Cooperative Management Board decided
14 the policy would be issued the second Tuesday of August. The
15 second Tuesday of August in 1986 was August 12, 1986. Judicial
16 notice can be taken of this fact.

17 The memorandum, R-2, is dated August 18, 1986 and the language
18 used in the memorandum is consistent with a conclusion that the
19 Cooperative Board had adopted the change in mileage reimbursement
20 policy at a prior date. Therefore, applying Conclusion of Law No.
21 5 to the facts of this case, I conclude that the Cooperative Board
22 adopted the revised mileage reimbursement policy prior to the time
23 it was submitted to 'meet and confer.' This assumes that the
24 presentation to the staff on the August 21, 1986, was a submission
25 to a "meet and confer" committee.

Therefore, the decision of Acting County Superintendent
Bidwell, as supplemented by the decision of Acting County

1 Superintendent Reynolds, is hereby reversed. The Cooperative
2 Management Board did not submit the revised mileage reimbursement
3 to a "meet and confer" committee prior to adoption by the
4 Cooperative.

5 DATED this 21 day of December, 1990.

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7 
8 NANCY KEENAN

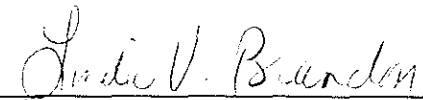
9 CERTIFICATE OF SERVICE

10 THIS IS TO CERTIFY that on the 21st day of December, 1990,
11 a true and accurate copy of the foregoing DECISION & ORDER was
mailed, postage prepaid to the following:

12 Emilie Loring
13 HILLEY & LORING
14 500 Daly Avenue
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16 VEEDER, BROEDER & MICHELOTTI, P.C.
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